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ALEXANDER L. STEVAS,
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82-715

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1982

NO.....

ADRON P. BRAINERD,
Petitioner,

-vs-

WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,
Respondents.

APPENDIX

Adron P. Brainerd, pro se
520 South Garfield Ave.
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 19, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

ADRON P. BRAINERD,

Plaintiff-Appellant,

No. 79-1898 vs.

WARREN E. BURGER, Chief Justice, United States Supreme Court, and H.S. Cunningham, Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1452

Prentice H. Marshall, Judge.

ORDER

On March 25, 1982, plaintiff-appellant Adron P. Brainerd filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition. The petition is therefore DENIED.

APP I

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Submitted: February 25, 1982*

March 11, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

ADRON P. BRAINERD,
Plaintiff-Appellant,

No. 79-1898 vs.

WARREN E. BURGER, Chief Justice of the U.S. Supreme Court, and H. S. CUNNINGHAM, Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1452
Hon. Prentice H. Marshall, Judge.

ORDER

The pro se plaintiff-appellant, Adron P. Brainerd, appeals from the dismissal of his civil rights claims against defendants-appellants, Warren E. Burger, Chief Justice of the United States, and H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, the dismissal of his action under the Freedom of Information Act (FOIA) against Cunningham, and the denial of his motion under Fed. R. Civ. P. 60(a) to correct a clerical mistake in

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*/ After preliminary examination of the briefs, the court notified the parties that it had tentatively decided that oral argument was unnecessary. The notice provided that any party could file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 14(f). Neither party filed such a statement. Upon consideration of the briefs and the record, the appeal is submitted for decision without oral argument.

APP II

ORDER

The pro se plaintiff-appellant, Adron P. Brainerd, appeals from the dismissal of his civil rights claims against defendants-appellants, Warren E. Burger, Chief Justice of the United States, and H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, the dismissal of his action under the Freedom of Information Act (FOIA) against Cunningham, and the denial of his motion under Fed. R. Civ. P. 60(a) to correct a clerical mistake in

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the entry of judgment in Brainerd v. Beal, No. 72-C-1571 (N.D. Ill. January 30, 1973), aff'd, 498 F.2d 901 (7th Cir.) (per curiam), cert. denied, 419 U.S. 1069 (1974), rehearing denied, 420 U.S. 913 (1975). Initially, the district court orally dismissed the civil rights claim against Chief Justice Burger and the FOIA claim against Cunningham. Subsequently, in an unpublished Memorandum Decision, the court dismissed the civil rights claim against Cunningham and denied Brainerd's motion under Fed. R. Civ. P. 60(a).

The statement of facts in the district court's Memorandum Decision is adequate for our purposes. However, we also note that Brainerd unsuccessfully sued his attorney for malpractice in state court. Apparently, based upon the affidavit of Cunningham, that court determined, contrary to this court's finding, that the judgment in Brainerd v. Beal was entered on February 1, 1973 and, therefore, that Brainerd's attorney was not negligent with respect to the filing of the notice of appeal.

We agree with the reasons for dismissing the civil rights claim against Cunningham set forth in the district court's Memorandum Decision, and they need not be repeated here. With respect to the civil rights claim against Chief Justice Burger, it is clear that, to the extent that the Chief Justice had any supervisory authority over Cunningham's entry of judgment in Brainerd v. Beal, he is absolutely immune from any liability arising out of its alleged nonfeasance, misfeasance or malfeasance.

Stump v. Sparkman, 435 U.S. 349 (1978); Skolnick v. Campbell, 454 F.2d 531 (7th Cir. 1971); Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969). It is also clear that FOIA does not apply to the courts of the United States. See 5 U.S.C Sect. 551(1)(B). Thus, the dismissal of the FOIA claim also was proper.

The denial of Brainerd's motion under Fed. R. Civ. P. 60(a), which was made at the district court's suggestion, also was proper. The disposition of this motion depends upon the application of the "Law of the Case" doctrine, See 1A Moore's Federal Practice Sect. 0.404[1], which militates against relitigation of issues decided in a previous stage of an action, but does not apply to questions which might have been decided in a previous stage but were not. 1A Moore's Federal Practice Sect. 0.404[10]. Moreover, even where an issue was previously decided, the "Law of the Case" doctrine does not absolutely bar subsequent reconsideration of it. The doctrine is not rigidly applied where the court determines that the declared law of the case is erroneous. 1A Moore's Federal Practice Sect. 0.404[1]. Reconsideration of jurisdictional issues is more appropriate than reconsideration of procedural and other non-jurisdictional issues. 1A Moore's Federal Practice Sect. 0.404[4]. However, although it does not have the same effect as the doctrine of res judicata, the "Law of the Case" doctrine

is more impelling than stare decisis because the "efficient dispatch of court business in a manner fairly approximating 'justice' is sometimes better than a tardy disposition that may approximate more nearly some theoretical ideal." 1A Moore's Federal Practice Sect. 0.404[1], at 4208 (footnote omitted).

In dismissing Brainerd's appeal in Brainerd v. Beal as untimely, we determined that the date of entry of judgment shown on the docket sheet could not be impeached by affidavit. Calculating the timeliness of the notice of appeal from the date, we held that the notice was not timely filed. Brainerd v. Beal, 498 F.2d at 902-03. The issue raised by Brainerd's Rule 60(a) motion is somewhat different. He now contends that the district court never entered final judgment on a separate document as required by Fed. R. Civ. P. 58. Because this issue was not actually resolved by our disposition of Brainerd's previous appeal, litigation of it is not precluded by the "Law of the Case" or a related doctrine. Brainerd requests in his motion that a judgment complying with Rule 58 now be entered, contenting that a timely appeal could be taken from such an entry. However, by his actions in the previous appeal, Brainerd has waived his objection to the failure to comply with Rule 58.

In Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam), the Court determined that the parties may waive the "separate document" requirement. It held that they had done so where: (1) the district court evidenced its intent to make a final, appealable decision; (2) a judgment of dismissal was recorded on the docket sheet; and (3) the appellee did not object to the appeal on

the ground that there was not a separate judgment. 435 U.S. at 387. See Also Escamilla v. Santos, 591 F.2d 1086 (5th Cir. 1979) (per curiam). The circumstances of this case compel the conclusion that the parties waived the "separate document" requirement. In Brainerd v. Real, as in Bankers Trust, the district court evidenced its intent to dismiss Brainerd's complaint entirely, thereby rendering a final, appealable decision; a dismissal was entered on the docket sheet; and the parties both proceeded as if a valid, appealable judgment had been entered. Moreover, at this point, approximately nine years after the judgment entry complained of, it would be unjust to provide the requested relief, even if Brainerd may have had a valid argument for dismissing the appeal without prejudice at the time. See United States v. Indrelunas, 411 U.S. 216 (1973) (per curiam).

AFFIRMED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

NO. 78 C 1452

ADRON P. BRAINERD,

Plaintiff,

-vs-

WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,

Defendants.

MEMORANDUM DECISION

On June 27, 1972, plaintiff filed a six count pro se complaint against two bank officers for violations of several federal statutes, claiming they had vailed to honor an oral agreement to stop payment on a cashier's check which plaintiff had presented to Joe Cross for purchase of an airplane. The case number of that action was 72 C 1571 and it was assigned to Judge Will. On October 24, 1972, Judge Will dismissed all but Count III of the complaint and gave Brainerd leave to file an amended Count III of the complaint and which would plead the alleged fraud with the requisite specificity.

After securing representation by attorney Richard Kates, Brainerd filed an amended complaint which sought to remedy that defect. He failed. On January 30, 1973, Judge Will granted defendants' motion to dismiss the amended complaint and entered a minute order dismissing the amended complaint. The docket entry for that order read as follows:

Date	Proceedings
1-30-73	Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed. (Court's Memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed Notices 2-1-73

Judge Will filed his memorandum opinion in support of that order on February 12. He held that the amended complaint failed to state a claim upon which relief could be granted and that it was barred by the Illinois statute of limitations. The opinion explained that although Brainerd's grievances could support actions in state court, he had no basis for relief in the federal courts.

Brainerd attempted to perfect an appeal from the January 30 order, by filing a notice of appeal on March 2, 1973. However, the Seventh Circuit dismissed the appeal, because the notice was not filed within thirty days from January 30, as required by Rule 4(a) of the Federal Rules of Appellate Procedure. The court rejected "unsworn affidavits signed by a deputy clerk of the district court," which contradicted the docket by stating that an order dated January 30 would normally have been entered on January 31 or February 1. Brainerd V. Beal, (7th Cir. 1974).

Instead, the court accepted the docket sheet as it appeared on its face, and found that it listed the entry of the district court's judgment on January 30, 1973 . Brainerd, supra at 901. The Supreme Court denied certiorari, 419 U.S. 1069 (1974) and denied rehearing, 420 U.S. 913 (1975).

On April 17, 1978, Brainerd filed a pro se complaint against Chief Justice Warren Burger and Stuart Cunningham, Clerk of the Court for this district. The complaint contains factual allegations which support Brainerd's earlier contention that Judge Will's judgement was actually entered on February 1, 1973, thereby suggesting that his appeal should not have been dismissed as untimely.

Brainerd alleges after his appeal was dismissed, he filed a state court action against his attorney Richard Kates, apparently for legal malpractice. Kates moved for summary judgment. He attached an affidavit from Stuart Cunningham, Clerk of this Court, who explained the docketing procedures of his office at the time the January 30, 1973 order was entered. Cunningham stated that the "I-30-73" date in the left margin of the docket sheet represented the date on which Judge Will entered his order. He further stated that the date given for the mailing of the notices, i.e. "2-1-73," was the date on which the order was actually entered on the docket sheet by his employees. Cunningham concluded that Brainerd's notice of appeal was filed within thirty days of the date the order was entered.

On the basis of this affidavit, the state court granted Kate's motion for summary judgement, finding that the appeal was timely and that Kates was not negligent in prosecuting it.

On the basis of the revelation, Brainerd has framed three counts against defendants Burger and Cunningham. In Count I, Brainerd claims that Cunningham has violated his constitutional right of access to the courts by making an improper docket entry, thereby transgressing 42 U.S.C. Sect. 1983. In Count II, plaintiff claims that Cunningham has violated the Freedom of Information Act by refusing to respond to his January 18, 1978 request for all papers relating to his notice of appeal and to the clerk's pertinent docketing procedures. In Count III, Brainerd claims that defendant Burger has violated his duty to supervise and enforce proper procedures in the application of Rules 58 and 79(a) of the Federal Rules of Civil Procedure, by failing to grant certiorari and remand the action in Brainerd v. Beal, supra. For relief, Brainerd seeks damages against both defendants for the amount sought in paragraph 11 of his complaint in 72 C 1571, as well as attorney's fees, costs, and other appropriate relief.

Defendants moved to dismiss Counts I and III of the complaint and moved for judgement on the pleadings on Count II. On October 11, 1978, we rendered an oral decision dismissing Counts II and III.

. We also suggested that Judge Will's January 30 order might not have been a final and appealable judgement, since the docket did not indicate that a judgement was ever set forth on a separate document, as required by Rule 58, F.R.Civ.P. Acting upon this suggestion, Brainerd moved to correct the record in 72 C 1571 and to direct the clerk to enter a Rule 58 judgement in that action. Conceivably, Brainerd could then appeal from that judgement and finally argue the merits of his case.

Before we consider that relief, we must decide whether Count I of Brainerd's complaint has a jurisdictional basis and states a claim for damages against the clerk. Brainerd alleges that Count I is based upon 42 U.S.C. Sect. 1983 and its jurisdictional counterpart, 28 U.S.C. Sect. 1343, because defendant Cunningham has acted under color of Rules 58 and 79(a), F.R.Civ.P., to deprive him of his constitutional rights under the First, Fourth, Sixth and Fourteenth Amendments to the federal constitution. In addition, he has moved to amend his complaint to add the First, Fourth, Sixth and Fourteenth Amendments to the federal constitution. In addition, he has moved to amend his complaint to add the Fifth Amendment as a jurisdictional basis.

Section 1983 provides a cause of action for constitutional deprivations arising out of actions taken under color of state law. However, it does not support a claim for actions taken under color of federal law. Askew v. Bloemker. 548 F.2d 673, 677 (7th Cir. 1976).

Because the clerk's alleged actions were authorized by the federal rules of civil procedure, rather than by state law, plaintiff's complaint lacks an essential jurisdictional predicate for a claim under Sect. 1983. Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978). We also find that plaintiff's claims do not involve the deprivation of any rights protected by the First, Fourth, Sixth, or Fourteenth Amendments. Therefore, plaintiff cannot bring an action under 28 U.S.C. Sect. 1331 based directly on those amendments. see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Nevertheless, Brainerd may well have a jurisdictional foothold under the due process clause of the Fifth Amendment, since three circuits have found a Bivens cause of action to be stated under that amendment. See. e.g., Loe v. Armistead, 582 F.2d 1299 (4th Cir. 1978) and cases collected in Davis v. Passman, 571 F.2d 793, 807-08 n.6 (Goldberg, J., dissenting).1/

1/ The Seventh Circuit has not directly faced the question of extending the Bivens rationale to claims under the Fifth Amendment. It has advised that "such a rationale should be made discreetly, but when appropriate, courts should do so." Green vs. Carlson, 581 F.2d 669, 673 (7th Cir. 1978). Among district courts in this circuit, Judge Grady recently implied a Bivens cause of action against federal officers under the equal protection component of the Fifth Amendment as a remedy for age discrimination in federal employment. Christie v. Marston, 451 F. Supp. 1142, 1144 (N.D. Ill. 1978).

Even assuming jurisdiction on that basis, however, Brainerd faces another insuperable obstacle to any claims for damages. The Seventh Circuit has granted absolute judicial immunity to court cle rks when they are discharging their official responsibilities. Dieu v. Norton, 411 F.2d 761, 763 (7th Cir. 1969); Brown v. Dunne. 409 F.2d 341, 343 (7th Cir. 1969). Other federal courts have taken a different view and have only given a qualified immunity to court clerks when they act in neglect or violation of their ministerial duties, such as filing papers and preparing records. See cases collected in Marty's Adult World of New Britain, Inc. v. Guida, 453 F. Supp. 810, 816 (D. Conn. 1978). Those courts have reasoned that absolute immunity is only necessary to protect an official's discretion in making crucial decisions, and that a clerk exercises no discretion when he performs required ministerial duties. See McCray v. State of Maryland. 456 F.2d 1, 4-5 (4th Cir. 1972). The Seventh Circuit considered this argument in Brown, supra, and seemed to agree that ministerial functions are not covered by official immunity. However, the court applied a narrow definition of ministerial functions, and specifically held that the charges against the clerk, which involved "malfeasance with respect to filing documents," "comprehend judicial rather ministerial functions." 409 F2d at 342-43. We are bound to follow the logical import of this rule, and believe that the charges against Cunningham are sufficiently akin to those in Brown so as to fall within the ambit of absolute immunity. For this reason, Count I of plaintiff's complaint must be dismissed.

We are left with plaintiff's motion to correct the record in 72 C 1571 and to direct the clerk to enter a proper Rule 58 judgment in that action. The defect identified in this motion qualifies as a clerical mistake within the scope of Rule 60(a), which provides that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

See Hamilton v. Stillwell Van & Storage Co., 343 F.2d 453, 455 (3d Cir. 1965); Pattiz v. Schwartz, 386 F.2d 300, 303 (8th Cir. 1968). Because Rule 60(a) is an express recognition of the inherent power of the federal courts, to correct clerical errors in judgements, American Trucking Association v. kFrisco Transportation Co., 358 U.S. 133, 145 (1958), we have power to consider Brainerd's Rule 60(a) motion in the 72 C 1571 despite the dismissal of his complaint in the present action.

The basic defect in plaintiff's motion is that he is attempting to relitigate [2] an issue which was conclusively determined against him by the Seventh Circuit in his original appeal. The court dismissed Brainerd's appeal as untimely under Rule 4(a), F.R.App.P. To apply that Rule, it was necessary for the court to identify the date upon which the judgment was "entered," since the rule provides that "the notice of appeal...shall be filed...within 30 days of the date of the entry of the judgment or order appealed from." The process of determining when a judgment is entered is explained in Coperton v. Beatrice Pocahontas oal Co., 585 F.2d 683, 688 (4th Cir. 1978):

> "Precise identification of the date on which an order or judgment was entered is necessary whenever the timeliness of an appeal to this court is in issue, since the time for filing a notice of appeal under Rule 4(a) begins to run only upon 'entry' of a judgment order and, absent such an entry, a part will not ordinarily be found to have exceeded any of the time periods set forth in the Rule regardless of when the notice of appeal was filed. 'Entry' has a well defined meaning under the rules; it occurs only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court.

2/ Concededly at our suggestion on October 11, 1978.

> This dual requirement is established by Civil Rule 58, Entry of Judgment, which states that '[e]very j udgment shall be set forth on a separat e document' and that' [a] judgment is ef fective only when so set forth and when entered as provided in Rkule 79(a) [.' Rule 4(a), which is derived without change in substance from a former civil rule, incorporates both of these standards."

Thus, in the normal case, Rule 4(a) cannot even be applied to compute the 30-day period until it is first established that the judgment has been entered on a separate document and that judgment has been notated on the docket sheets. However, in the present case, the Court of Appeals applied the rule despite the absence of a separate document,[3/] and found that Judge Will's judgment was entered on January 30, 1973. That finding is conclusive as to Brainerd, and hes collaterally estopped from attacking it. Therefore, even if we were to correct the record to comply with the separate document requirement, Brainerd's time for appeal would still have to be computed from January 30, 1973. Our action would serve no useful purpose, since the thirty days in which kBrainerd must file his notice of appeal have long since lapsed.

3/ The Court of Appeals had jurisdiction to apply Rule 4(a) in this manner and reach a timeliness decision even absent a separate document. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978).

For these reasons, Brainerd's Rule 60(a) motion is denied.[4/]

Judgment will enter dismissing plaintiff's action.

ENTER:

_____

Prentice H. Marshall
United States District Judge

Dated+ May 29, 1979

4/ We are distressed over the mousetrap in which Mr. Brainerd has been ensnared. The Court of Appeals for this Circuit held that Brainerd's lawyer let the time for appeal expire. The state court in essence held that Brainerd's lawyer did not let the time for appeal expire. We are bound by the Court of Appeals decision and have no authority to question the state court decision. We have pondered in vain for some remedy for Mr. Brainerd and can think of none.